SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

RICHARD W. BROWN, PETITIONER,

vs.

WESTERN RAILWAY OF ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed January 20, 1948

Georgia, Fulton County

To The Superior Court of Said County:

The petition of Richard J. Brown, respectfully shows:

1. That the Western Railway of Alabama, hereinafter styled the defendant is a corporation organized under the laws of a State other than Georgia, but having an office, agent, and place of doing business in said State and County upon whom service or process may be had.

2. That defendant has injured and damaged petitioner in the sum of $5,000.00, by reason of the facts hereinafter stated.

3. That on or about the 25th day of August, 1947, petitioner was in the employ of Atlanta and West Point Railroad company and the defendant, Western Railway of Alabama as a brakeman on freight train No. 1, running from Atlanta to West Point, Georgia as an employee of the Atlanta and West Point Railroad Company, and from West Point, Georgia, through Opelika, Alabama to Montgomery, Alabama as an employee of defendant, his duties as such requiring that he turn switches, give signals, apply and release hand brakes on cars, to couple, and uncouple cars and generally to assist in switching movements necessary to be made.

4. That on or about the 25th day of August, 1947, "petitioner while engaged in the employment aforesaid was injured as a result of the negligence of defendant when he slipped and fell on a large clinker lying beside the track in the switch yards at Opelika, Alabama, over which it was necessary for petitioner to cross in giving signals to his engineer" as appears more fully hereinafter.

5. Petitioner alleges that "the yards aforesaid are jointly operated by the defendant and the trustees of the Central [fol. 8] of Georgia Railway Company."

6. Petitioner alleges that "defendant had allowed clinkers, coal bottles, tie plates, trash and other debris to

collect in said yards along the side of the tracks and that it was necessary for petitioner, in the performance of his duties, to cross over all such material and debris."

7. Petitioner alleges that "it was the duty of the defendant to use reasonable and proper care to provide him a reasonably safe place in which to work in the course of his duties and employment."

8. That "the defendant did not regard its duties in this behalf to use reasonable and proper care to provide plaintiff a reasonably safe place in which to discharge his duties as aforesaid; but directed him to work in said yards at said time under the conditions above described."

9. Petitioner alleges that 'the debris aforesaid scattered along beside the tracks and over said yards at said point made yards unsafe for use by petitioner in the performance of his duties and that defendant thereby negligently failed to furnish petitioner a reasonably safe place in which to work by reason thereof."

10. On the date aforesaid, "petitioner while switching cars in the yards aforesaid, ran around the engine as his duties at said time required, to mount the top of cars being handled so that he could see the back end of the cut of cars and the engineer at the same time; and give the necessary signals for the switching movement there being made; and while in the performance of such duties as aforesaid he stepped on a large clinker lying beside the tracks as aforesaid which caused petitioner to fall and be injured in [fol. 9] the particulars hereinafter set out.

11. Thereafter, petitioner was carried to the Company physician in Opelika, Alabama, where his foot was X-rayed and the X-ray disclosed that the 5th metatorsal bone was broken and that it was necessary for foot to be placed in a cast.

12. Petitioner shows that the fifth metatorsal bone of his right foot was broken and that all the other bones, nerves, muscles, flesh, skin and tissues of his right foot were wrenched, strained, sprained and injured causing petitioner to suffer great physical and mental pain and agony.

13. That as a result of said injury and foot being placed in a cast petitioner was off work for thirty (30) days.

14. Petitioner further shows that on or about October 14th, due to great pain in his right foot, it was re-X-rayed which disclosed the break of the bone in his foot had never healed; that his foot was again placed in a cast and plaintiff was off from his work forty-seven (47) additional work days, making the total of work days lost on account of said injury seventy-eight (78).

15. Petitioner shows that prior to the accident, he was a strong, able-bodied man, earning the sum of $15.80 per day for his labors and that he lost 45 work days at this rate of pay; that there after a new rate of pay was substituted the same being $17.97, and that he lost 33 work days at the new rate of pay, making a total of $1304.01, lost on account of said injury.

16. Plaintiff alleges that his injuries aforesaid was directly and proximately caused in whole or in part by the negligence of the defendant in the particulars hereinafter set out:

[fol. 10] 17. The defendant was negligent:

(a) In failing to furnish plaintiff with a reasonably safe place in which to work as herein alleged.

(b) In leaving clinkers, bottles, tie plates, sticks, trash and other debris along the side of track in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen, working therein and that petitioner would have to perform his duties with said yards in such condition.

(c) In not removing clinkers, bottles, tie plates, sticks, trash and other debris from its yards before assigning plaintiff to work therein at said time and place as herein alleged.

18. That at all times herein mentioned defendant was a common carrier by railroad engaged in the transportation of interstate commerce and the instrumentalities upon which plaintiff was working at said time and place were instrumentalities that were used in the furtherance of interstate commerce and the same were engaged in interstate commerce and plaintiff, at the time of his injuries, was engaged in interstate commerce.

Wherefore, plaintiff prays judgment against defendant in the full sum sued for and that process may issue directed

to defendant requiring it to be and appear in this Court on a day certain as is now provided by law to answer this complaint.

T. J. Lewis, Attorney for Plaintiff.

[File endorsement omitted.]

[fols. 11-12] In Superior Court of Fulton County

[Title omitted]

Demurrer—Filed February 3, 1948

Now comes the defendant in the above stated case and demurs to the petition filed therein and shows:

1. Said petition does not set forth a cause of action and is otherwise insufficient in law.

Wherefore, defendant asks that said petition be dismissed.

Heyman, Howell & Heyman, Defendant's attorneys.

[File endorsement omitted.]

In Superior Court of Fulton County

Order Sustaining Demurrer—June 1, 1948

Upon hearing, the foregoing demurrer is sustained and the above stated case is dismissed.

This June 1, 1948.

Walter C. Hendrix, Judge, Superior Court, Atlanta Circuit.

[fol. 13] IN THE COURT OF APPEALS OF GEORGIA

32130

BROWN

v.

WESTERN RAILWAY OF ALABAMA

OPINION—

By the Court:

In an action brought under the Federal Employers' Liability Act (U. S. C. A. § 51 et seq.), where it appears from the allegations of the petition, when construed most strongly against the pleader, that the negligence which caused the injuries complained of was that of the employee who failed to notice and avoid a large clinker in the railroad yard, but instead stepped on the same and fell, and where the alleged facts fail to disclose any negligence on the part of the employer which caused or contributed to the alleged injury, the employer is not liable to such employee, and the trial court did not err in sustaining a general demurrer to the employee's petition and in dismissing the action.

Richard J. Brown sued Western Railway of Alabama in Fulton Superior Court for injuries sustained while in the employ of said company. The petition alleged substantially the following: The defendant railroad is a corporation having an office, agent, and place of doing business in Fulton County, and has injured and damaged petitioner in the sum of $5,000. The plaintiff was employed on or about August 25, 1947, by Atlanta and West Point Rail Road Company as a brakeman on freight train No. 1, running from Atlanta to West Point, and by Western Railway of Alabama, the defendant, on this same train while it was running from West Point, Georgia, through Opelika, Alabama, to Montgomery, Alabama. "Petitioner while engaged in the employment aforesaid was injured as a result of [fol. 14] the negligence of defendant when he slipped and fell on a large clinker lying beside the track in the switch yards of Opelika, Alabama, over which it was necessary for petitioner to cross in giving signals to his engineer . . . The yards aforesaid are jointly operated by the defendant and the trustees of the Central of Georgia Railway Company . . . Defendant had allowed clinkers, coal, bottles, tie

plates, trash, and other debris to collect in said yards along the side of the tracks and . . . it was necessary for petitioner, in the performance of his duties, to cross over such material and debris . . . It was the duty of defendant to use reasonable and proper care to provide him a reasonably safe place in which to work in the course of his duties and employment . . . The defendant did not regard its duties in this behalf to use reasonable and proper care to provide plaintiff a reasonably safe place in which to discharge his duties as aforesaid, but directed him to work in said yards at said time under the conditions above described . . . The debris aforesaid scattered along beside the tracks and over said yards at said time made [the] yards unsafe for use by petitioner in the performance of his duties, and . . . . defendant thereby negligently failed to furnish petitioner a reasonably safe place in which to work by reason thereof . . . Petitioner, while switching cars in the yards aforesaid, ran around the engine, as his duties at said time required, to mount the top of cars being handled so that he could see the back end of the cut of cars and the engineer at the same time and give the necessary signals for the switching movement there being made, and while in the performance of such duties as aforesaid, he stepped [fol. 15] on a large clinker lying beside the tracks as aforesaid, which caused petitioner to fall and be injured in the particulars hereinafter set out." The petition contains a description of the plaintiff's injuries and shows that a bone of his right foot was broken, which did not at first heal properly, with resulting pain and the loss of time from work. It is alleged that $1304.01 was lost in wages because of his inability to work as a result of the injuries. Negligence is charged to the defendant in the following particulars: "(a) In failing to furnish plaintiff with a reasonably safe place in which to work as herein alleged. (b) In leaving clinkers, bottles, tie plates, sticks, trash and other debris along the side of track in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakeman working therein and that petitioner would have to perform his duties with said yards in such condition. (c) In not removing clinkers, bottles, tie plates, sticks, trash and other debris from its yards before assigning plaintiff to work therein at said time and place as herein alleged." The plaintiff shows that

he and the defendant were engaged in interstate commerce at the time of the accident.

The defendant filed a general demurrer to the petition. The case is here on exceptions to the order sustaining the general demurrer and dismissing the petition.

[fol. 16] SUTTON, C. J. (After stating the foregoing facts.):

This is an action in which recovery is sought for injuries sustained by an employee of a railroad company engaged in interstate commerce while such employee was engaged in the performance of his duties, and is controlled by the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq. Although brought in a State court, all matters of substance are controlled by Federal law. Seaboard Air Line Railway v. Horton, 233 U. S. 492 (3) (34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475); Central of Ga. Ry. Co. v. Goeus, 30 Ga. App. 770, 773 (119 S. E. 669); Southern Ry. Co. v. Bradshaw, 73 Ga. App. 438, 440 (37 S. E. 2d 150). "The act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury." Ellis v. Union Pacific R. Co., 329 U. S. 649 (67 Sup. Ct. 59, 91 L. ed. 576); Brady v. Southern Ry. Co., 320 U. S. 476, 484 (64 Sup. Ct. 232, 88 L. ed. 239); 45 U. S. C. A. § 51. Where the act or acts, or the failure to act, which resulted in the injury are the acts or omissions of the employee who is injured, and those acts or the failure to act constitute the negligence which brought about the injury, and there is no negligence on the part of the employer which caused or contributed to the injury, such employer is not liable therefor. McGivern v. Northern Pacific Ry. Co., 132 Fed. 2d 213 (11). Also see Frese v. Chicago, B. & Q. Ry. Co., 263 U. S. 1 (44 Sup. Ct. 1, 68 L. ed. 131); Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. [fol. 17] 351 (50 Sup. Ct. 281, 71 L. ed. 896); Powell v. Waters, 55 Ga. App. 307 (190 S. E. 615); Tankersley v. Southern Ry. Co., 73 Ga. App. 88, 91 (35 S. E. 2d 522); Atlantic Coast Line R. Co. v. Anderson, 73 Ga. App. 343, 349 (36 S. E. 2d 435). Hence, it is of primary consideration whether the petition shows negligence on the part of the employer which is in whole or in part the cause of the injury, and in determining the sufficiency of the allegations of the petitioner in this respect on general demurrer to the petition, which admits only facts well pleaded, and not the

conclusions of the pleader, the allegations will be construed most strongly against the pleader. Stripped of its details, the petition shows that the plaintiff was injured while in the performance of his duties when he stepped on a large clinker lying alongside the track in the railroad yards. In the absence of allegations to the contrary, the inference arises that the plaintiff's vision was unobscured and that he could have seen and avoided the clinker. Although the presence of other debris in the yards is shown in the petition, it is not shown that this debris was in any way responsible for the accident. The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence. Furthermore, it is not shown how or for what length of time the clinker was in the yard, or wherein it rendered the yard unsafe for employees accustomed to work there. Insofar as the allegations of the petition show, the sole cause of the accident was the act of the plaintiff in stepping on this large clinker, which he was able to see and could have avoided. It was he who, without any outside inter-[fol. 18] vention, failed to look, stepped on the clinker, and fell. Under such circumstances, there is no question of negligence on the part of the defendant to present to a jury, and the trial court did not err in sustaining the general demurrer and in dismissing the action.

Careful consideration has been given to the briefs of counsel for the plaintiff in error, and the authorities there cited do not authorize or require a different ruling from the one herein made. The cases dealing with the abolition of the doctrine of assumption of risk in actions arising under the Federal Employers' Liability Act, and the effect of contributory negligence under the act, are necessarily predicated upon a showing of negligence on the part of the employer, and are inapplicable to the case at bar.

Judgment affirmed. Felton and Parker, JJ., concur.

[fols. 19-30] IN THE COURT OF APPEALS OF GEORGIA

JUDGMENT—October 2, 1948

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered: R. J. Brown v. Western Railway of Alabama. This case came before this

court upon a writ of error from the Superior Court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Sutton, Felton and Parker, JJ., concur.

[fols. 31-34] IN THE COURT OF APPEALS OF GEORGIA

ORDER DENYING REHEARING—October 22, 1948

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed: R. J. Brown v. Western Railway of Alabama. Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fols. 35-36] IN THE SUPREME COURT OF GEORGIA

ORDER DENYING CERTIORARI—January 12, 1949

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Richard J. Brown v. Western Railway of Alabama.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of Costs, $15.00.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta:

Jan. 24, 1949.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that T. J. Lewis paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

K. C. Bleckley, Clerk.

Case No. 32130.
Court of Appeals of Georgia.

Remittitur from Supreme Court

Filed in office Jan. 24, 1949. Morgan Thomas, Deputy Clerk Court of Appeals of Georgia.

[fol. 37] SUPREME COURT OF THE UNITED STATES, — TERM, 1949

Number ——

RICHARD J. BROWN, Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA, Respondent

STIPULATION AS TO PRINTED RECORD

Pursuant to Rule 38, par. 8, of the Supreme Court of the United States it is stipulated and agreed by and between counsel for the above-named parties that there may be omitted from the printed record in the above-entitled cause the following matter not essential to the question presented by the petition for the writ of certiorari to be filed herein:

1. Bill of Exceptions.
2. Certificate of Judge as to Bill of Exceptions.
3. Exhibit A to Bill of Exceptions.
4. Acknowledgement of Service of Bill of Exceptions.
5. Certificate of Bill of Exceptions, Deputy Clerk, Superior Court.
6. Certificate of Filing Bill of Exceptions in office of Clerk, Court of Appeals of Georgia.
7. Certificate of Transcript of Record by Deputy Clerk, Superior Court.
8. Certificate of Filing Transcript of Record in Office of Clerk, Court of Appeals of Georgia.
9. Motion for Rehearing, Court of Appeals of Georgia.
10. Certificate of Counsel on Motion for Rehearing, Court of Appeals of Georgia.
11. Acknowledgement of Service of Motion for Rehearing, Court of Appeals of Georgia.

[fol. 38] 12. Certificate of Filing Motion for Rehearing in office of Clerk, Court of Appeals of Georgia.

13. Certiorari Notice.
14. Certificate of Service of Certiorari Notice.
15. Notice to Clerk of Court of Appeals of Georgia of Filing Application for Certiorari in Supreme Court of Georgia.
16. Certificate of Filing Notice of Application for Certiorari, by Clerk, Court of Appeals of Georgia.

17. Certificate of Payment of Costs in Supreme Court of Georgia.

18. Certificate of Record by Clerk, Court of Appeals of Georgia.

It is further stipulated and agreed that should the Clerk of the Supreme Court of the United States deem it necessary or desirable to include any of the foregoing in the printed record, he is authorized to do so.

This, the 10th day of February, 1949.

Thomas J. Lewis, Attorney for Petitioner, First National Bank Bldg., Atlanta, Ga. Morris B. Shaw, Heyman, Howell & Heyman, Attorney- for Respondent, Connally Building, Atlanta, Ga.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 2, 1949

The petition herein for a writ of certiorari to the Court of Appeals of the State of Georgia is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.